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IN THE

# Supreme Court of the United States

October Term, 1971

No. 72-298

ALEX COOLEY, ET AL., etc.,
*Petitioners,*

v.

WILLIAM BAER ENDICTOR, Assistant Solicitor of the Criminal Court of Fulton County, ET AL.,
*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

## PART ONE

## STATEMENT OF THE CASE

William Baer Endictor, Assistant Solicitor of the Criminal Court of Fulton County; Herbert Jenkins, Chief of Police of the City of Atlanta; Jack C. McEntire, Captain of the Vice Squad of the Police Department of the City of Atlanta; Hinson McAuliffe, Solicitor General of the Criminal Court of Fulton County; Lewis Slaton, District Attorney of the Atlanta Judicial Circuit; and Leroy Stynchcombe, Sheriff of Fulton County, Respondents, pray that the Application for Writ of Certiorari to the Supreme Court of Georgia to review the judgment entered in this case on April 3, 1972, be denied.

## OPINION BELOW

The decision sought to be reviewed by this Court is reported at 458 F. 2d 513. It is also set out as "Exhibit 15 A" in Petitioner's Petition for Writ of Certiorari.

## JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

## QUESTIONS PRESENTED

1. Whether A Single District Judge To Whom An Application To Convene A Three-Judge Court Has Been Made May Dismiss Such Application Where No Basis Is Set Forth For Invoking The Traditional Equity Jurisdiction Of The Federal Courts.

2. Whether Suggested Good Faith Enforcement Of A State Criminal Statute Justifies Federal Equitable Intervention Against The Future Enforcement Of The State Criminal Statute.

3. Whether The Granting Of Declaratory Judgment Concerning Threatened Future Criminal Prosecutions Is Determined By The Same Test As The Propriety Of Granting Injunctive Relief.

## STATEMENT OF THE FACTS

William Baer Endictor resigned his position as Assistant Solicitor of the Criminal Court of Fulton County in November, 1971. He is not a law enforcement officer or prosecutor in this State and therefore this case should be dismissed as to him. (See Certificate attached.)

The Petitioners filed a class action in the United States District Court of the Northern District of Georgia, At-

lanta Division, on July 8, 1971 seeking declaratory and injunctive relief against the enforcement of Georgia's indecent exposure statute, Georgia Code Section 26-2105, and alleged that the said Code Section is unconstitutional in that it impinges upon First Amendment rights in the production of live theatre and other art forms.

Petitioners sued Defendants, McEntire and Endictor, in their official capacity and individually as "Having threatened to harass the Plaintiffs, Cooley, Herring, and Key".

Three of the Petitioners are directly connected with the production and presentation of the musical play entitled "STOMP". However, the fourth Petitioner, M. E. JOHNSON, JR., is a member of the theatre-going public who seeks the opportunity to view works of art and hear political ideas of others without bowdlerization. None of the alleged acts of the Respondents were directed to M. E. JOHNSON, JR., and Respondents urge that he has no standing to complain.

In their Complaint the Petitioners alleged bad faith harassment on the part of the Respondents and further alleged that they were suffering irreparable injury. Two days after the Complaint was filed the building in which the play was being presented was burned and destroyed completely by fire. Thereafter, the Play was presented at Georgia Tech Student Center for a few performances and has not been presented in the Atlanta area since that time.

Paragraph 19 of the Complaint attacked the constitutionality of Georgia Code Section 26-2011, Georgia Acts 1968, Page 1249, 1301. This paragraph was struck in open court by Petitioner's counsel who stated it was erroneously included therein. (Appendix—Page 15)

The Petitioners requested an ex parte temporary restraining order "upon the evidence" which was not granted.

Thereafter on the 19th day of July, 1971, the District Court directed Petitioners to show cause to the existence of bad faith harassment, and in its absence, why the said case should not be dismissed. (A-72, 73).

This case came on for a hearing before the District Court Judge on August 5, 1971.

The Respondents introduced into evidence the Affidavit of W. Baer Endictor (R-92, A-84) which in summary states that he was invited by Captain Jack C. McEntire, of the Atlanta Police Department, to attend a meeting with Captain McEntire and Mr. Alex Cooley, one of the Petitioners herein. He further stated that because of several complaints concerning the nude scenes in the said play, Captain McEntire was of the opinion that perhaps the producers of "STOMP" were not familiar with the Acts of the 1971 Georgia General Assembly amending Chapter 26-21 of the Code of Georgia by incorporating in and including as part of said Chapter, Code Section 26-2105, effective April 1, 1971. It was suggested at the meeting that Mr. Cooley discuss the provisions of the new Act with his Attorney.

Thereafter, Mr. Cooley requested a second meeting which was attended by Cooley, William Dial, their Attorney Morris Brown, and Respondents, McEntire and Endictor. Mr. Brown wanted to discuss the new Act in more detail and was particularly concerned about the provision of Code Section 26-2105, Subsection (b), which provides:

> "Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Deponent stated to Mr. Brown that in all misdemeanor offenses every person who procures, counsels, aids, abets or assists in any manner is guilty as a principal; and that, in the opinion of Deponent, the Legislators encompassed this provision in the Act for the purpose of putting all persons specifically on notice as to whom could be technically held responsible for the offense of participation in indecent exposure.

Mr. Brown asked Deponent if, in his opinion, Subsection (b) would include the producer of the musical play "STOMP", and Deponent replied that, in his opinion, it would apply to all persons who knowingly counseled or assisted other persons to engage in such conduct.

Mr. Brown then asked Deponent if "he would be satisfied" by the posting outside of the theatre building a sign warning the general public of the nude scenes in said play and by the exclusion of minors from the audience.

Deponent stated to Mr. Brown that the Supreme Court of Georgia in the case of *Evans Theatres v. Slaton*, 227 Ga. 377 (7), held that "It is a crime under our criminal law (Code Section 26-2101) to exhibit an obscene film to the public even though minors are not invited to view it." That while the Stanley Doctrine (*Stanley v. Georgia*, 89 S.Ct. 1243) was grossly extended by the United States District Courts and United States Courts of Appeal to obtain the legal conclusion that the "constitutional right to

private possession of obscene materials envisions the constitutional right to obtain and receive them or attend an exhibition thereof and conversely, the right to disseminate or exhibit them to consenting adults under controlled circumstances, that is to say that it is constitutionally permissible to exhibit material whether or not it is obscene under controlled circumstances, not involving pandering or disseminated to minors or foistered upon the public in such a manner that would affront individuals wishing to avoid confrontation with it." This theory was thoroughly discredited by the Supreme Court of the United States in reversing *U.S. v. 37 Photographs,* 91 S.Ct. 1400; and *U.S. v. Reidel,* 91 S.Ct. 1410. In *Reidel* the Supreme Court held: "But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now."

Deponent further stated that, in his opinion, obscenity cannot by any method of distribution be brought within the protection of the First Amendment and, therefore, Brown's suggestion that posting outside the theatre warnings respecting nudity in the play or the exclusion of minors from the audience would not bring the performance, if otherwise in violation of the law, within the protection of the First Amendment and would be of no comfort to them.

Deponent further says that his participation in each of the conferences hereinabove referred to was a good faith discussion of the law relating to First Amendment cases as applied to the Georgia Statute at the request of others and particularly with Mr. Morris Brown, Attorney at Law for Plaintiffs herein. That Deponent did not request or solicit the conferences and at no time did Deponent

threaten any person or persons with mass arrest or prosecution.

Petitioners did not see fit to put Mr. Cooley on the witness stand or anyone else connected with the said production.

A complete transcript of the proceedings, admissions and stipulations of Counsel, as well as the argument of Counsel, appears in Pages 1 through 48 of the Record and Pages 1 through 48 of the Appendix.

During the argument, Mr. Brown conceded that he could not demonstrate bad faith harassment on the part of the Respondents and further conceded that the material in the production "STOMP" changes from night to night. He referred to it as "a modern theatre". And stated:

> "I grant the Court, and I pointed out specifically in our suit or in our brief, that the area of regulating our obscenity in theatre is possibly the thorniest thing you can have because it more than any other art form is unfixed, especially modern theatre where there is a *great deal of ad lib* material. *The material does change from night to night.* Nobody fools around with Shakespeare; it's there, you can look at it. But, with modern theatre, and every generation it is said has to write its own drama, you can't put your fingers on it for a very long time. It is very difficult. (Appendix 34-35). *Emphasis Added.*

Whereupon, Respondents urged the Court that an injunction against future prosecution would necessarily be based upon speculation of human conduct and not upon facts. That each performance of the theatre must be judged accordingly.

At the conclucion of the hearing the Trial Court entered full findings of fact and conclusions of law (Appendix—88), and entered judgment dismissing the case (Appendix—102).

In the findings of fact, the Trial Court relates to the alleged bad faith in the following language:

> "This means, of course, that for Plaintiff to merit federal injunctive relief they must demonstrate bad faith on the part of these Defendants. *As Plaintiffs conceded at the hearing, however, there simply is no evidence on which to base such a conclusion.* In view of the very recent enactment of the indecent exposure statute, and Plaintiffs' probable ignorance of its terms, Defendants chose to warn Plaintiffs before invoking the criminal process against them. Later, when Plaintiffs desired further discussion on the matter, Defendants willingly complied. *If any judgment concerning Defendant's conduct is called for, it is that they exercised the utmost good faith.*" Record Page 102 (Page 95).

Petitioners filed their appeal in the United States District Court of Appeals for the Fifth Circuit and the Judgment of the District Court was affirmed on April 3, 1972.

Thereafter, the United States Court of Appeals for the Fifth Circuit denied a Petition for rehearing and petition for rehearing en banc, on the 22nd day of May, 1972.

## PART TWO

## ARGUMENT AND CITATION OF AUTHORITY

## REASONS FOR NOT GRANTING THE WRIT

### A. THE CASE PRESENTS NO JUSTICIABLE FEDERAL QUESTION.

#### 1. A SINGLE DISTRICT JUDGE TO WHOM AN APPLICATION TO CONVENE A THREE-JUDGE COURT HAS BEEN MADE MAY DISMISS SUCH APPLICATION WHERE NO BASIS IS SET FORTH FOR INVOKING THE TRADITIONAL EQUITY JURISDICTION OF THE FEDERAL COURTS.

Judicial economy dictates that a single District Judge determine whether, when application is made to convene a three judge court, the factual situation justifies the granting of such application. The three judge procedure is an extraordinary one, imposing a heavy burden on Federal Courts, with attendant expense and delay. *Haymes v. Landon,* 115 F. Supp. 506 (S.D. Calif. 1953).

A single District Judge when reviewing the application under 28 U.S.C.A. §2281 must determine if jurisdiction lies in the Federal Court (*Lion Mfg. Corp. v. Kennedy,* 330 F. 2d 833 (D.C. 1964); *Crossen v. Breckenridge,* 446 F. 2d 833 (6th Cir. 1971)); if the constitutional question is substantial; if there is a basis for equitable relief and if the case otherwise comes within the requirements of 28 U.S.C.A. §2281 and 28 U.S.C.A. §2284. *Idlewild Bon Voyage Liquor Corporation v. Epstein,* 370 U.S. 711, 82 S.Ct. 1294 (1962); *Saiz v. Goodwin,* 325 F. Supp. 23 (D.C.N.M. 1971); *Duncombe v. New York,* 267 F. Supp. 103 (S.D.N.Y. 1962). If the District Judge finds that any

of the aforementioned circumstances are not present he should dismiss the application without convening the three judge court. *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833 (D.C. 1964).

The District Judge must view the application in light of the fact that the three judge court requirement is a technical one and is to be construed narrowly. *Gate Film Club v. Pesce*, 236 F.Supp. 828 (S.D.N.Y. 1964), cert. den. 380 U.S. 944 (1965).

It is also the duty of the District Judge to whom application is made to determine if there is support for the allegations of the Complaint in fact or law.

> . . . the limitations of the statute(28 U.S.C.A.§2281) would be defeated were it enough to keep three judges assembled that a Plaintiff could resort to the mere form of words in his Complaint, with no support therefor in fact or law . . . *Haymes v. Landon*, 115 F. Supp. 506, 508 (S.D. Calif. 1953); *Sellers v. Regents of University of California*, 432 F.2d 493 (9th Cir. 1970), cert. den. 401 U.S. 981 (1971).

For Equity to intervene in criminal prosecutions there must be some special circumstances and irreparable injury for traditionally equity will not enjoin a criminal prosecution. *Sellers v. Regents of University of California*, 432 F. 2d 493 (9th Cir. 1970), cert. den. 401 U.S. 981 (1971); *Linihan v. Waterfront Commission of New York Harbor*, 116 F. Supp. 401 (S.D.N.Y. 1953); *Stefanelli v. Minard*, 342 U.S. 117, 120, 72 S.Ct. 118 (1953). This has been consistently true even though it was alleged that state prosecutions are *threatened* under a statute already declared unconstitutional. *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877 (1943).

The District Court in the instant case ruled upon issues of equity not the doctrine of abstention which deals with motions of federalism and comity. See *Lewis v. Kugler*, 446 F. 2d 1343 (3rd Cir. 1971).

In *Abel v. Markle*, 452 F. 2d 1121 (2d. Cir. 1971) the Court simply held that the question of abstention is for a three judge panel. *Abel* did not in any way change the longstanding rule that the judge to whom application is made must find equitable grounds for intervention. Therefore, the Second Circuit is not in conflict with the Fifth Circuit.

In the instant case the District Judge found no special circumstances or any evidence whatsoever to justify equitable intervention. There was no bad faith harassment, nor any irreparable injury which is not incident to every criminal prosecution brought or threatened in good faith. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116 (1965). Therefore it was his duty to dismiss the application.

In *Crossen v. Breckenridge*, 446 F. 2d 833 (6th Cir. 1971) the only issues before the Sixth Circuit were standing and case or controversy.

> The parties on appeal have viewed the decision of the District Court substantially as we have stated it, for both sides have briefed as the *only* issue for decision whether the complaint presented a case or controversy.

The Court in *Crossen* did not concern itself with the question of the equitable intervention and the case is therefore not in conflict with the rule used in the Fifth Circuit. See *Becker v. Thompson*, 159 F. 2d 1919 (5th Cir. 1972).

## 2. SUGGESTED GOOD FAITH ENFORCEMENT OF A STATE CRIMINAL STATUTE DOES NOT JUSTIFY FEDERAL EQUITABLE INTERVENTION AGAINST THE FUTURE ENFORCEMENT OF THE STATE CRIMINAL STATUTE.

The District Court found as fact, and the counsel for Plaintiffs below admitted, that there was no bad faith harassment by state officials. In fact, the District Court found the utmost good faith on the part of the State.

It is axiomatic that there must be some great and immediate irreparable harm to justify enjoining a state criminal prosecution. *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877 (1943), *Becker v. Thompson*, 459 F.2d 919 (5th Cir. 1972). In instances where prosecutions are pending in State Court this Court has held that the "great and immediate harm" must be measured by bad faith harassment. *Younger v. Harris*, 401 U.S. 37 (1971); *Becker v. Thompson*, 459 F. 2d 919 (5th Cir. 1972); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116 (1965); *Sellers v. Regents of University of California*, 432 F. 2d 493 (9th Cir. 1970), cert. den. 401 U.S. 981 (1971).

No person is immune from good faith prosecution of a criminal statute, and the allegation that the statute is unconstitutional is not enough in itself to justify federal injunctive relief. *Brooks v. Bailey*, 274 F. Supp. 538 (M.D. Tenn. 1967), affirm. per cur. 391 U.S. 361, 88 S.Ct. 1671; *Wells v. Hand*, 238 F. Supp. 799 (M.D. Va. 1965), affirm. per cur. 382 U.S. 39, 86 S.Ct. 160.

> "Federal injunctions against state criminal statutes either in their entirety or with respect to their sep-

> arate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. 'No citizen or member of the community is immune from prosecution, in good faith for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the Plaintiff who seeks its aid . . .' *Watson v. Buck*, 313 U.S. 387 (1941)."

*Brooks v. Bailey*, 274 F. Supp. 538 (1967), affirm. 391 U.S. 361, 88 S.Ct. 1671.

The Plaintiff carries the same burden in threatened, as well as pending, state prosecutions when he seeks a federal injunction restraining future enforcement of a state criminal statute. *Boyle v. Landry*, 401 U.S. 77 (1971). See *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116; *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877 (1943); *Williams v. Miller*, 317 U.S. 599, 63 S.Ct. 258 (1942); *Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962 (1941); *Fenner v. Boykin*, 271 U.S. 240, 46 S.Ct. 492 (1926); *Ex parte Young*, 296 U.S. 123, 28 S.Ct. 441 (1908); *Brooks v. Bailey*, 274 F. Supp. 538, aff'd. 391 U.S. 361, 88 S.Ct. 1671; *Wells v. Hand*, 238 F. Supp. 799, (M.D. Va. 1965), aff'd. 382 U.S. 39, 86 S.Ct. 160.

*Lewis v. Kugler*, 446 F. 2d 1343 (3rd Cir. 1971) differs from the instant case. *Kugler* was a civil rights action against state officials, but it did not involve a state criminal statute. Plaintiff in Lewis alleged *bad* faith and deliberate unconstitutional harassment in the form of unlawful search and seizures. The Court held that such state

action was not enough to justify intervention with respect to those Plaintiffs with pending actions, but was sufficient with regard to those Plaintiffs against whom no pending state action was present. Plaintiff in *Kugler* pled facts that Petitioners herein wish they could plead and *prove*.

### 3. THE GRANTING OF DECLARATORY JUDGMENT CONCERNING THREATENED FUTURE CRIMINAL PROSECUTIONS IS DETERMINED BY THE SAME TEST AS THE PROPRIETY OF GRANTING INJUNCTIVE RELIEF.

At the outset it must be remembered that the granting of declaratory judgment relief is in the sound discretion of the District Court who should not exercise it arbitrarily. *Sellers v. Regents of University of California*, 432 F. 2d 493 (9th Cir. 1970), cert. denied 401 U.S. 981; *New York Central R. Co. v. Colonial Stores, Inc.*, 332 F. Supp. 530.

> "The same equitable principles relevant to the propriety of an injunction must be taken into consideration by Federal District Courts in determining whether to issue a declaratory judgment, and . . . where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well. *Samuels v. Mackell*, 401 U.S. at 73, 91 S.Ct. at 668."

In *Samuels v. Mackell, supra*, it was clear that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid. This is so, of course, because the declaratory judgment may serve as the basis for a subse-

quent injunction; and, even if the declaratory judgment is not used as a basis for an injunction, it has the same impact as an injunction. *Becker v. Thompson*, 459 F. 2d 419 (5th Cir. 1972).

To allow declaratory relief without showing bad faith would lead to a circumvention of that requirement for injunction. Plaintiff would be getting an injunction without any circumstances to justify such a grant simply by changing the name of the relief prayed for.

*Samuels* does not apply here because there was a pending state prosecution, but the reasoning of that case does.

However, this Court's opinion in *Boyle v. Landry*, 401 U.S. 77 (1971) does not have the limiting language of *Samuels*. See *Hunter v. Allen*, 422 F. 2d 1158 (5th Cir. 1970), reversed, *Emby v. Allen*, 401 U.S. 989, 91 S.Ct. 1237 (1971).

It has been shown heretofore that the same considerations with regard to pending actions also apply to threatened actions.

It must be emphasized that in the instant case Plaintiffs are not required to violate the criminal statute to determine if it is constitutional. Here, Plaintiffs *did* the unlawful act and the State chose not to prosecute but to warn. Plaintiffs threw the *"tea into the harbor"* and now complain that the State refused to shoot first and ask questions later. It is undeniable that if the State had shot first *Younger* would have applied. If the race for the Courthouse is the only consideration then State officials will have no choice but to arrest instead of a more reasonable course of warning—especially where a new statute is involved.

*Wulp v. Corcoran*, 454 F. 2d 826 (1st Cir. 1972) is clearly in error in that "It ignored the fact that a Plaintiff has the same burden when making application for injunction and declaratory judgment even if the State action is threatened but not pending." *Wulp* also revives the misconception concerning the broad sweep of *Dombrowski* that *Younger* took pains to point out and disapprove. *Becker v. Thompson, supra.*

In *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct., 391 (1967) this Court did not pass upon the equitable requirements for declaratory judgment and injunction but only disposes of the doctrine of abstention which deals with Comity and Federalism. The holding in *Zwickler* has no bearing on the instant case which deals only with the issue of equitable intervention in a criminal matter.

## CONCLUSION

The undisputed facts clearly dictate that there can be but one ruling by the Trial Court however constituted; and that Petitioners have not demonstrated error in the proceedings below. For these and all of the foregoing reasons, Respondents urge this Court to decline to issue a Writ of Certiorari in this case.

Respectfully submitted,
Original Pen Signed By

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## CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, that I have this day deposited in the United States Post Office, Atlanta, Georgia, two (2) copies of the foregoing Brief of Respondents In Opposition To The Petition For Writ Of Certiorari with First Class postage pre-paid, addressed to MR. MORRIS BROWN, EMILY CARSSOW and NEIL BRADLEY, 52 Fairlie Street, N.W., Atlanta, Georgia 30303, Counsel of record for Petitioners.

That all persons required to be served have been served.

This the 29 day of November, 1972.

Original Pen Signed By,

JOEL M. FELDMAN
Assistant District Attorney
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301 Fulton County Courthouse
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## CERTIFICATE

I, HINSON McAULIFFE, hereby certify that I am the Solicitor General of the Criminal Court of Fulton County.

I further certify that WILLIAM BAER ENDICTOR, resigned his position as Assistant Solicitor of the Criminal Court of Fulton County in November, 1971, and since the said date has not been associated with this office either directly or indirectly in any manner whatsoever.

This the 20th day of November, 1972.

/s/ HINSON McAULIFFE

HINSON McAULIFFE, Solicitor General
Criminal Court of Fulton County